Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Petition for Retroactive Waiver Filed by bebe stores, inc.	CG Docket No. 02-278

OPPOSITION TO BEBE STORES, INC.'S PETITION FOR RETROACTIVE WAIVER

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I. Introduction and Background

Petitioner bebe stores, inc. ("Petitioner" or "bebe") is presently a defendant in *Meyer, et al. v. Bebe Stores, Inc.*, a recently-certified class action case in which plaintiffs allege that bebe failed to obtain prior express written consent from consumers before sending them telemarketing text messages.[1] Now, through its November 28, 2016 petition, bebe seeks a waiver of its prior-express-written-consent obligations in connection with the *Meyer* class action (as well as for its obligations beyond the *Meyer* action, as explained in greater detail below). The appeal of such a waiver to bebe is understandable, given that the *Meyer* court recently certified the class action under Rule 23, a ruling that considerably increases bebe's exposure in the litigation. Bebe evidently believes—erroneously—that a retroactive waiver would permit it to circumvent the court's certification order.

Bebe argues that it is entitled to such a waiver because it is similarly situated to Mammoth Mountain Ski Area, to whom the Commission granted a limited waiver in connection with the prior-express-written-consent requirement; however, bebe's decision to ride on the coat-tails of the Mammoth Petition, whose form and substance bebe slavishly reproduces in its own petition, is fundamentally misguided.

II. The Commission Should Ignore bebe's Unsubstantiated Claims That it Previously Obtained Written Consent From Consumers

The Commission's ruling in Mammoth, in hindsight, vividly illustrates the problems that can arise when the Commission grants retroactive waivers to corporations *on demand*, without requiring them to make a corresponding factual showing of good cause for the waivers.

In the Mammoth ruling, the Commission granted limited waivers of the prior-express-

[1] The undersigned represent named plaintiffs Melita Meyer, Samantha Rodriguez, and Courtney Barrett, in the *Meyer v. Bebe* action, Case No. 14-267 (N.D. Cal.), and have been appointed as Class Counsel.

written-consent rules to seven petitioners, including Mammoth, in light of purported confusion about the rule.[2] The Commission restricted the waivers to calls for which some form of written consent had previously been obtained.[3] The Commission, however, explicitly rejected any calls for the petitioners to make a factual showing that they had previously obtained written consent, finding "a detailed factual analysis unnecessary and not required to determine whether the petitioners had actually obtained written consent prior to seeking waiver."[4] Instead, the Commission's ruling simply assumed as a given that Mammoth had obtained the written consent prior to seeking waiver, based on Mammoth's unsubstantiated representation that it had, in fact, obtained the requisite written consent.[5]

The Commission's ruling in Mammoth, however, has not served judicial economy, has not eased the district court's dockets, has not simplified matters for Mammoth or any other corporation that alleges confusion about the prior-express-written-consent rules, and has not otherwise served the public interest. Notwithstanding the Commission's granting of a waiver, Mammoth continues to litigate the *Story v. Mammoth* action[6], a TCPA putative class action in which it is named as a defendant. In other words, the Commission's ruling in Mammoth has not had the consequence desired by Mammoth: the mooting of the *Story* class action.

The Commission's ruling was ultimately of no consequence to the *Story* litigation because Mammoth could not provide any evidence to the court that it had previously obtained written consent, as claimed in its petition. The *Story* court rejected Mammoth's bald assertion that a

[2] Oct. 14, 2016 FCC Order at § I.1.

[3] *Id.* at § III.15.

[4] *Id.* ("The Commission did not undertake a review of the written consent obtained earlier by waiver recipients, and we decline to do so here.").

[5] *Id.* (granting waivers based on petitioner's claims "that they are similarly situated, and seek the same relief.").

[6] Case No. 14-2422 (E.D. Cal.)

consumer's mere provision of a cell phone number constituted *written* consent.

> [T]he Court does not find support for the proposition that Plaintiff's provision of his phone number to Defendant constituted written consent. In addressing the CMEP and DMA petitions, the FCC may very well conclude that written consents obtained before the rule change may continue to be effective, however, this will not necessarily affect the viability of Plaintiff's claim in this action.[7]

Nor has Mammoth been able to marshal any other affirmative evidence of written consent.

Any grant of a waiver is particularly toothless in the Ninth Circuit and its district courts, where the *Story* and *Meyer* class actions are pending, because, in the Ninth Circuit (and elsewhere), prior express consent is an affirmative defense on which the TCPA defendant bears the burden of proof.[8] Specifically, the burden is on a TCPA defendant to establish, through affirmative evidence, that it obtained prior express consent for all the text messages that it sent, not on plaintiffs to establish that defendant failed to obtain the requisite intent.[9] Mere evidence of a policy to obtain prior express consent is insufficient. A TCPA defendant must proffer evidence of *specific instances* of consent.[10] *Kristensen v. Credit Payment Services* is instructive:

> Defendants have not submitted any evidence of express consent. Their reliance on James Gee (of AC Referral Systems) and Michael Ferry (of 360 Data Management and Absolute ROI) is misplaced, *as neither has personal knowledge whether Kristensen or the other purported class members consented when they visited one of the "hundreds" of websites that Defendants allege were the original sources of the cell phone numbers*. In addition, AC Referral did not appear to have a mechanism to verify consent. Finally, the relevant records of AC Referral and 360 Data Management apparently are no longer available.[] If, as it appears, Defendants can provide no evidence of consent, Defendants will probably lose on this issue regardless of who carries the burden at trial. Class members could provide individual affidavits averring lack of consent, and Defendants would be unable to rebut with

[7] See *Story* Dkt. No. 45 at 8:8-11

[8] *Grant v. Capital Mgmt. Servs.*, L.P., 449 Fed. Appx. 598, 600 n.1 (9th Cir. 2011).

[9] *See Meyer v. Portfolio Recovery Associates, LLC*, 707 F. 3d 1036, 1042 (9th Cir. 2012) (holding consent defense will not bar certification when a defendant provides no evidence where express consent was given before the call was placed); *Hicks v. Client Servs., Inc.*, 2009 WL 2365637, at *5 (S.D. Fla. June 10, 2009) ("The burden of establishing prior express consent i[s] on the Defendant.").

[10] *See Meyer*, 707 F. 3d at 1042 ("[Defendant] did not show a single instance where express consent was given before the call was placed.").

> anything other than the unfounded testimony of James Gee and Michael Ferry. Reviewing these affidavits would not be unduly burdensome for the Court, especially in light of the alternative of dealing with thousands of individual lawsuits.[11]

Accordingly, even if the *Commission* does not require a factual showing of consent, *the Ninth Circuit does*. Any waiver granted by the Commission will therefore always be subject to a later evidentiary showing regarding consent. Accordingly, it would serve judicial economy and the public interest for the Commission to impose a threshold evidentiary bar at the petition stage—to obviate, or at a minimum, lessen the need for subsequent evidentiary proceedings on the issue.[12]

Bebe has, naturally, neglected to inform the Commission of these developments in the *Story* action. This is likely because bebe's petition, too, offers no proof that it obtained the requisite written consent. Rather, bebe simply asserts, without more, that it "is similarly situated to petitioners who received waiver in the 2015 Declaratory Ruling and 2016 Declaratory Ruling …." Bebe also nebulously suggests—without ever fully articulating its argument—that the mere provision of phone numbers constituted written consent.[13] Yet, this offer of "proof" was insufficient in the *Story* action, and it will certainly be insufficient in the *Meyer* action as well. Even if the Commission grants bebe a waiver here, that waiver would likely be of no moment in the *Meyer* litigation. The *Meyer* litigation has been pending since January 16, 2014—nearly two years as of the date of this opposition—and in that time, bebe has not offered any evidence that it previously obtained written consent. In fact, bebe's corporate designees have testified that no written disclosures were made and no written consent was obtained, when the cell phone numbers

[11] *Kristensen v. Credit Payment Servs.,* 12 F. Supp. 3d 1292, 1307 (D. Nev. 2014) (footnote omitted) (emphasis added).

[12] Perhaps recognizing that the Commission's waiver was not the expedient end-run for which it had hoped, Mammoth has now agreed to mediate the *Story* action.

[13] *See* Bebe Petition at p. 2 ("Thus, whenever a member provided her cell phone number (e.g., on-line, at a point of sale or on a client capture card), the consumer's express consent to receive a single confirmatory, opt-in text message [] was confirmed through her/his participation in clubbebe.").

were communicated to bebe's employees at the point of sale, which resulted in text messages at issue. If bebe had presented any evidence that it obtained prior express written consent, the *Meyer* court likely would not have certified a class action.

Given the manifest problems with its "no evidence" approach to granting waivers, the Commission, which considers petitions for waiver on a case-by-case basis[14], should reject the "no evidence" approach here and give no weight to bebe's unsubstantiated—and demonstrably false—claims that it previously obtained prior express written consent.[15]

III. Bebe's Sought-After Waiver Far Exceeds the Scope of the Waiver Granted in Mammoth

Even if the Commission were willing to overlook bebe's evidentiary failures, the Commission should nevertheless deny bebe's petition because bebe is seeking a waiver that far outstrips the scope of the one granted in Mammoth.

The Mammoth petition involved the collection of phone numbers from consumers through a single mechanism: Mammoth's website.[16] (The petition describes no other methods by which Mammoth obtained phone numbers from consumers.) Indeed, Mammoth repeatedly confirmed that its petition sought only a waiver with respect to the calls for which consumers previously provided written consent (*i.e.*, through its website). The following statements are representative:

- "Pursuant to our discussion, Mammoth seeks only a discrete clarification: Commission action to clarify that the Telephone Consumer Practice Act ("TCPA") rules effective October 16, 2013 do not nullify the validity of those written consents in place prior to that date, nor do such rules require Mammoth to obtain new consents from customers who provided written consent prior to such date. [¶] We explained that such a clarification would avoid imposing the effort required to obtain a second, duplicative

[14] See Oct. 14, 2016 FCC Order at § III.18.

[15] Bebe's failure to offer any proof that it previously obtained written consent should also give the Commission pause regarding any claim that bebe was confused about the language of the Commission's 2012 order.

[16] *See* Feb. 23, 2015 Mammoth Petition at p. 2 ("Many Mammoth Mountain consumers purchase these products and provide their personally-identifiable information [including their telephone number] to Mammoth on the Mammoth website.").

consent, which would confuse those Mammoth guests who had already provided written consent to contact from Mammoth."[17]

- "As explained in Mammoth's petition pending before the Commission, Mammoth obtained valid written consent to contact its customers under the TCPA from those customers who provided Mammoth their phone numbers in writing."[18]

- "Mammoth explained in its previous filings that it believes the 2012 TCPA Order[] did not nullify the validity of those written consents in place prior to the effective date of the new rule."[19]

Based on these representations, the Commission granted a limited waiver of commensurate scope: for only those calls where Mammoth had previously obtained some form of written consent, namely, through its website.

> We emphasize, however, that the waivers granted here only apply to calls for which some form of written consent had previously been obtained. Nothing in the Commission's 2015 decision suggested that parties could reasonably have been confused about the requirement that the consent in question had to be written, and the Commission was specific in that regard.[] We also note that the petitioners there specified that they were requesting clarification only about whether they could continue to rely on previously obtained written consent.[20]

By contrast, bebe admits that it is seeking a far broader waiver than the one granted in Mammoth: a waiver that encompasses not only phone numbers obtained through bebe's website (as in Mammoth), but also those obtained "at a point of sale[,]" *i.e.*, at the cash register in a retail store.[21] Yet, the communication of a phone number at the point of sale (obviously) does not involve a writing. Rather, at the point of sale, the consumer provides his or her phone number to a bebe staff member *orally*. This, by definition, is not written consent, let alone written consent that complies with the Commission's regulations, which impose a stringent set of requirements for

[17] Mammoth's Apr. 30, 2015 *Ex Parte* at p. 1.

[18] Mammoth's Dec. 10, 2015 *Ex Parte* at p. 2.

[19] *Id.*

[20] Oct. 14, 2016 FCC Order at III.15.

[21] See bebe Petition at p. 2.

written consent.[22]

In short, bebe has provided the same evidentiary showing that Mammoth provided in its petition—which is to say, none at all—but is asking for an even broader waiver than the one contemplated in the Mammoth declaratory ruling. Such a waiver would relate not only to texts for which bebe sought a phone number through its website, but also for those for which bebe sought a phone number at its retail store cash registers (and any other mechanism that bebe might care to enumerate). Yet, bebe has not made any evidentiary showing justifying such a broad waiver—or any other waiver, for that matter.

The breadth of the sought-after waiver is especially problematic because it seems designed to permit bebe to evade liability in the *Meyer* action. The *Meyer* action, on the one hand, involves solely phone numbers provided orally to bebe at the point of sale, where bebe has admitted that it failed to obtain the requisite written consent.[23] The Mammoth petition and ruling, on the other

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[22] In pertinent part, the regulations state as follows:

> (8) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.
>
> (i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:
>
> (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
>
> (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.
>
> (ii) The term ''signature'' shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.
>
> 47 U.S.C. § 64.1200(f)(8).

[23] The *Meyer* court certified the following subclasses under Rule 23:

> **1. Post-October 16, 2013 Non-Club Bebe Class**
> All persons within the United States who provided their mobile telephone number to bebe in one of bebe's stores ***at the point-of-sale*** **and** were sent an SMS or text message from bebe during the period

hand, involve only phone numbers provided to Mammoth through its website, which are ostensibly written in nature. Notwithstanding these factual differences, and based on no more evidence than was presented in the Mammoth petition, bebe now also seeks a waiver for phone numbers obtained orally at the point of sale. Bebe should not be permitted to bootstrap the Mammoth ruling into a broader-than-warranted waiver here.

IV. Conclusion

The Mammoth petition serves as an object lesson in what can go wrong when the Commission grants waivers to corporations on demand. Meyer, et al. urge the Commission not to make the same mistake again here. Rather, the Commission should require petitioners to proffer evidence establishing, among other things, that the petitioner obtained previous written consent and that it was, in fact, confused about the 2012 Order.

In light of bebe's failure to make any such showing here, the Commission should deny its Petition. (Bebe ought not be permitted to cite new evidence on reply, given the obvious prejudice that would result to Meyer, et al. and other interested parties.) Separately, the Commission should deny the Petition because it seeks a waiver that far exceeds the one in Mammoth—and all without any kind of evidentiary showing.

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of time beginning October 16, 2013 and continuing until the date the Class is certified, who were not members of Club bebe during the Class Period.

2. Post-October 16, 2013 Club Bebe Class
All persons within the United States who provided their mobile telephone number to bebe in one of bebe's stores ***at the point-of-sale*** and were sent an SMS or text message from bebe during the period of time beginning October 16, 2013 and continuing until the date the Class is certified, who were members of Club bebe during the Class Period. (Meyer Dkt. No. 106 at 18:23-19:8, emphases added.)

The court's certification of the Club bebe class was conditioned on class counsel's ability to find a proper representative for the class. On October 21, 2016, Plaintiffs filed an amended complaint naming Courtney Barrett as a representative for the Club bebe class. Bebe subsequently filed motions challenging Ms. Barrett's adequacy as a class representative. The court will hear the motions on January 31, 2017.

If, instead, the Commission elects to adhere to its current approach (of not requiring an evidentiary showing), the Commission can expect a flood of "me too" petitioners, hands outstretched, demanding waivers of their obligations under the TCPA but offering no assurances of fair play in return.

Dated: January 6, 2017

Respectfully submitted,

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